§ 1.1441–7 General provisions relating to withholding agents.

(a) * * *

Example 7. CO is a domestic clearing organization. CO serves as a central counterparty clearing and settlement service provider for derivatives exchanges in the United States. CB is a broker organized in Country X, a foreign country, and a clearing member of CO. CB is a nonqualified intermediary, as defined in § 1.1441–1(c)(14).

FC is a foreign corporation that has an account with CB. FC instructs CB to purchase a call option that is a specified ELI (as described in § 1.871–15(e)). CB effects the trade for FC on the exchange. The exchange matches FC’s order with an order for a written call option with the same terms. The exchange then sends the matched trade to CO, which clears the trade. CB and the clearing member representing the person who sold the call option settle the trade with CO. Upon receiving the matched trade, the option contracts are novated and CO becomes the counterparty to CB and the counterparty to the clearing member representing the person who sold the call option. To the extent that there is a dividend equivalent with respect to the call option, both CO and CB are withholding agents as described in paragraph (a)(1) of this section. As a withholding agent, CO and CB must each determine whether it is obligated to withhold under chapter 3 of the Internal Revenue Code and the regulations thereunder.

Example 8. FCO is a foreign clearing organization. FCO serves as a central counterparty clearing and settlement service provider for derivatives exchanges in Country A, a foreign country. CB is a broker organized in Country A, and a clearing member of FCO. CB is a nonqualified intermediary, as defined in § 1.1441–1(c)(14).

FC is a foreign corporation that has an account with CB. CB provides a written statement to FCO, which clears the trade, confirming that CB has assumed primary withholding responsibility for any dividend equivalent payment with respect to the call option. FCO, therefore, is not required to withhold, deposit, and report amounts under chapters 3 and 4 of Internal Revenue Code. CB provides a written statement to FCO representing that it has assumed primary withholding responsibility for any dividend equivalent payment with respect to the call option. FCO, therefore, is not required to withhold a dividend equivalent payment to CB.

Example 9. The facts are the same as Example 8, except that CB is a qualified intermediary, as defined in § 1.1441–1(c)(15), that has assumed the primary obligation to withhold, deposit, and report amounts under chapters 3 and 4 of Internal Revenue Code. CB provides a written statement to FCO representing that it has assumed primary withholding responsibility for any dividend equivalent payment with respect to the call option. FCO, therefore, is not required to withhold a dividend equivalent payment to CB.

(f) * * *(1) Except as otherwise provided in this paragraph, paragraph (e)(7) of this section applies to payments made on or after September 18, 2015. Paragraphs (e)(7)(iii)(D) and (e)(7)(iv) through (viii) of this section apply to payments made on or after January 19, 2017.

Par. 8. Section 1.1441–7 is amended by:

1. Revising Example 7 in paragraph (a)(3).

2. Adding Example 8 and 9 to paragraph (a)(3).

3. Adding a sentence to the end of paragraph (a)(4).

The additions read as follows:

§ 1.1441–7 General provisions relating to withholding agents.

(a) * * *

Example 7. CO is a domestic clearing organization. CO serves as a central counterparty clearing and settlement service provider for derivatives exchanges in the United States. CB is a broker organized in Country X, a foreign country, and a clearing member of CO. CB is a nonqualified intermediary, as defined in § 1.1441–1(c)(14).

FC is a foreign corporation that has an account with CB. FC instructs CB to purchase a call option that is a specified ELI (as described in § 1.871–15(e)). CB effects the trade for FC on the exchange. The exchange matches FC’s order with an order for a written call option with the same terms. The exchange then sends the matched trade to CO, which clears the trade. CB and the clearing member representing the person who sold the call option settle the trade with CO. Upon receiving the matched trade, the option contracts are novated and CO becomes the counterparty to CB and the counterparty to the clearing member representing the person who sold the call option. To the extent that there is a dividend equivalent with respect to the call option, both CO and CB are withholding agents as described in paragraph (a)(1) of this section. As a withholding agent, CO and CB must each determine whether it is obligated to withhold under chapter 3 of the Internal Revenue Code and the regulations thereunder.

Example 8. FCO is a foreign clearing organization. FCO serves as a central counterparty clearing and settlement service provider for derivatives exchanges in Country A, a foreign country. CB is a broker organized in Country A, and a clearing member of FCO. CB is a nonqualified intermediary, as defined in § 1.1441–1(c)(14).

FC is a foreign corporation that has an account with CB. CB provides a written statement to FCO, which clears the trade, confirming that CB has assumed primary withholding responsibility for any dividend equivalent payment with respect to the call option. FCO, therefore, is not required to withhold, deposit, and report amounts under chapters 3 and 4 of Internal Revenue Code. CB provides a written statement to FCO representing that it has assumed primary withholding responsibility for any dividend equivalent payment with respect to the call option. FCO, therefore, is not required to withhold a dividend equivalent payment to CB.

Example 9. The facts are the same as Example 8, except that CB is a qualified intermediary, as defined in § 1.1441–1(c)(15), that has assumed the primary obligation to withhold, deposit, and report amounts under chapters 3 and 4 of Internal Revenue Code. CB provides a written statement to FCO representing that it has assumed primary withholding responsibility for any dividend equivalent payment with respect to the call option. FCO, therefore, is not required to withhold a dividend equivalent payment to CB.

The regulations relate to the determination of whether an interest in a corporation is treated as stock or indebtedness for all purposes of the Internal Revenue Code.

DATES: These corrections are effective on January 23, 2017, and applicable October 21, 2016.


SUPPLEMENTARY INFORMATION:

Background

The final and temporary regulations that are the subject of this correction are under sections 385 and 752 of the Internal Revenue Code.
Need for Correction
As published, the final and temporary regulations contain errors which may prove to be misleading and need to be clarified.

List of Subjects in 26 CFR Part 1
Income taxes, Reporting and recordkeeping requirements.

Correction of Publication
Accordingly, 26 CFR part 1 is corrected by making the following correcting amendments:

PART 1—INCOME TAXES

Paragraph 1. The authority citation for part 1 continues to read in part as follows:
Authority: 26 U.S.C. 7805 * * *

Par. 2. Section 1.385–1 is amended by revising the fifth sentence of paragraph (c)(4)(vii) Example 2 (i) to read as follows:
Example 2. * * *
(i) * * * In addition to other assets representing 85% of the value of its total assets, S2 owns all of the stock of S3, which has elected to be treated as a taxable REIT subsidiary of S2 under section 856(i)(1).

Par. 3. Section 1.385–2 is amended by:
2. Revising the third paragraph of paragraph (a)(5)(ii).
3. Revising the first sentence of paragraph (a)(5)(ii).
4. Revising the third sentence of paragraph (b)(1).
5. Revising the third sentence of paragraph (c)(2)(ii).
6. Revising the second sentence of paragraph (c)(2)(iii)(A).
7. Revising the third sentence of paragraph (c)(2)(iii)(E).
8. Revising the paragraph (c)(3)(i)(A) subject heading.
10. Revising the third sentence of paragraph (c)(4)(ii)(A).
13. Revising the paragraph (c)(4)(ii)(E) subject heading.

§ 1.385–1 General provisions.

(c) * * *
(4) * * *
(vii) * * *

Example 2. * * *
(i) * * * An issuer is also considered to have characterized an EGI as indebtedness if the issuer claims any federal income tax benefit with respect to an EGI resulting from characterizing the EGI as indebtedness for federal tax purposes, such as by claiming an interest deduction under section 163 with respect to interest paid or accrued on the EGI on a federal income tax return (or, if the issuer is a member of a consolidated group, the issuer or the common parent of the consolidated group claims a federal income tax benefit by claiming such an interest deduction), or if the issuer reports the EGI as indebtedness or amounts paid or accrued on the EGI as interest on an applicable financial statement. * * *

(ii) * * * The consistency rule in paragraph (a)(5)(i) of this section and section 385(1) does not apply with respect to an EGI to the extent that the EGI is treated as stock under this section or § 1.385–3, or it has been determined that the EGI is treated as stock under applicable federal tax principles. * * *

(b) * * *
(1) * * * If the documentation and information described in paragraph (c) of this section are not prepared and maintained with respect to an EGI in accordance with this section, and no exception listed in paragraph (b)(2) of this section applies, the EGI is treated as stock for all federal tax purposes. * * *

(c) * * *
(2) * * *
(ii) * * * The rights of a creditor must include rights that superior to the rights of shareholders (other than holders of interests treated as stock solely by reason of § 1.385–3 and holders of interests with creditor’s rights under commercial law treated as stock under this section) to receive assets of the issuer in case of dissolution. * * *

(A) * * * Documentation required under paragraph (c)(2) of this section may be prepared by employees of expanded group members, by agents of expanded group members, or by third parties.

(3) * * *
(i) * * *

(A) Revolving credit, omnibus, umbrella, master, cash pool, and similar agreements—

(3) * * *

(4) * * *

(ii) * * *

(A) * * * In the case of an applicable interest that becomes an EGI subsequent to issuance, including an intercompany obligation, as defined in § 1.1502–13(g)(2)(ii), that ceases to be an intercompany obligation, the relevant date is the date on which the applicable interest becomes an EGI.

(B) * * *

(1) * * * In the case of an applicable interest that becomes an EGI subsequent to issuance, the relevant date is the date on which the applicable interest becomes an EGI and any relevant date after the date that the applicable interest becomes an EGI.

(2) * * *

(i) In general. * * *

(3) Relevant dates for EGIs documented under an overall
arrangement. A relevant date of an EGI under paragraphs (c)(4)(ii)(A) through (C) of this section is also a relevant date for each EGI documented under an overall arrangement described in paragraph (c)(3) of this section.

- (d) * * * *
- (2) * * * *
- (i) * * * *
- (A) Any interest that is issued or deemed issued in the legal form of a debt instrument (including a draw or separate amount borrowed under an overall arrangement described in paragraph (c)(3) of this section regardless of whether a separate legal document is issued in connection with the draw or separate amount borrowed), which therefore does not include, for example, a sale-repurchase agreement treated as indebtedness under federal tax principles; or
- (e) * * * *
- (3) * * * *
- (ii) * * * For purposes of determining whether an EGI originally treated as indebtedness ceases to be treated as indebtedness by reason of this section, the rules of this section apply before the rules of § 1.1001–3.

- (h) * * * *
- (4) * * * *

Example. Application of paragraphs (c)(2)(iii) and (c)(4) of this section to an EGI.

- (ii) * * *
- (A) * * * Because FP is traded on an established financial market within the meaning of § 1.1092(d)—1(b) and US$I$ is a covered member, EI$A$, EI$G$, and EI$C$ are subject to the rules of this section.

- (C) The credit analysis was prepared with an analysis date of Date B of Year 1.

Par. 4. Section 1.385–3 is amended by:

2. Revising the paragraph (b)(5) subject heading.
3. Revising the first sentence of paragraph (c)(3)(i)(C)(1).
4. Revising the paragraph (c)(3)(ii)(C)(3) subject heading.
6. Adding subject headings to paragraphs (g)(3)(iii) introductory text, (g)(3)(iii) introductory text, and (g)(3)(iv) introductory text.
8. Adding a subject heading to paragraph (g)(3)(v).
9. Revising paragraphs (g)(24)(ii)(B) and (C)

The additions and revisions read as follows:

§ 1.385–3 Transactions in which debt proceeds are distributed or that have a similar effect.

- (b) * * * *
- (3) * * * *
- (ii) * * * *
- (E) * * * *

(2) Effect of certain modifications. Notwithstanding paragraph (b)(3)(iii)(E)(1) of this section, if a covered debt instrument is treated as exchanged for a modified covered debt instrument pursuant to § 1.1001–3(b) and the modification, or one of the modifications, that results in the deemed exchange includes the substitution of an obligor on the covered debt instrument, the addition or deletion of a co-obligor on the covered debt instrument, or the material deferral of scheduled payments due under the covered debt instrument, then the modified covered debt instrument is treated as issued on the date of the deemed exchange for purposes of paragraph (b)(3)(iii)(A) of this section.

- (5) Coordination between general rule and funding rule.

Example. Application of paragraphs (c)(2)(iii) and (c)(4) of this section to an EGI.

- (ii) * * *
- (A) * * * Because FP is traded on an established financial market within the meaning of § 1.1092(d)—1(b) and US$I$ is a covered member, EI$A$, EI$G$, and EI$C$ are subject to the rules of this section.

- (C) The credit analysis was prepared with an analysis date of Date B of Year 1.

Par. 4. Section 1.385–3 is amended by:

2. Revising the paragraph (b)(5) subject heading.
3. Revising the first sentence of paragraph (c)(3)(i)(C)(1).
4. Revising the paragraph (c)(3)(ii)(C)(3) subject heading.
6. Adding subject headings to paragraphs (g)(3)(iii) introductory text, (g)(3)(iii) introductory text, and (g)(3)(iv) introductory text.
8. Adding a subject heading to paragraph (g)(3)(v).
9. Revising paragraphs (g)(24)(ii)(B) and (C)

The additions and revisions read as follows:

§ 1.385–3 Transactions in which debt proceeds are distributed or that have a similar effect.

- (b) * * * *
- (3) * * * *
- (ii) * * * *
- (E) * * * *

(2) Effect of certain modifications. Notwithstanding paragraph (b)(3)(iii)(E)(1) of this section, if a covered debt instrument is treated as exchanged for a modified covered debt instrument pursuant to § 1.1001–3(b) and the modification, or one of the modifications, that results in the deemed exchange includes the substitution of an obligor on the covered debt instrument, the addition or deletion of a co-obligor on the covered debt instrument, or the material deferral of scheduled payments due under the covered debt instrument, then the modified covered debt instrument is treated as issued on the date of the deemed exchange for purposes of paragraph (b)(3)(iii)(A) of this section.

- (5) Coordination between general rule and funding rule.

Example. Application of paragraphs (c)(2)(iii) and (c)(4) of this section to an EGI.

- (ii) * * *
- (A) * * * Because FP is traded on an established financial market within the meaning of § 1.1092(d)—1(b) and US$I$ is a covered member, EI$A$, EI$G$, and EI$C$ are subject to the rules of this section.

- (C) The credit analysis was prepared with an analysis date of Date B of Year 1.

Par. 4. Section 1.385–3 is amended by:

2. Revising the paragraph (b)(5) subject heading.
3. Revising the first sentence of paragraph (c)(3)(i)(C)(1).
4. Revising the paragraph (c)(3)(ii)(C)(3) subject heading.
6. Adding subject headings to paragraphs (g)(3)(iii) introductory text, (g)(3)(iii) introductory text, and (g)(3)(iv) introductory text.
8. Adding a subject heading to paragraph (g)(3)(v).
9. Revising paragraphs (g)(24)(ii)(B) and (C)

The additions and revisions read as follows:

§ 1.385–3 Transactions in which debt proceeds are distributed or that have a similar effect.

- (b) * * * *
- (3) * * * *
- (ii) * * * *
- (E) * * * *

(2) Effect of certain modifications. Notwithstanding paragraph (b)(3)(iii)(E)(1) of this section, if a covered debt instrument is treated as exchanged for a modified covered debt instrument pursuant to § 1.1001–3(b) and the modification, or one of the modifications, that results in the deemed exchange includes the substitution of an obligor on the covered debt instrument, the addition or deletion of a co-obligor on the covered debt instrument, or the material deferral of scheduled payments due under the covered debt instrument, then the modified covered debt instrument is treated as issued on the date of the deemed exchange for purposes of paragraph (b)(3)(iii)(A) of this section.

- (5) Coordination between general rule and funding rule.

Example. Application of paragraphs (c)(2)(iii) and (c)(4) of this section to an EGI.

- (ii) * * *
- (A) * * * Because FP is traded on an established financial market within the meaning of § 1.1092(d)—1(b) and US$I$ is a covered member, EI$A$, EI$G$, and EI$C$ are subject to the rules of this section.

- (C) The credit analysis was prepared with an analysis date of Date B of Year 1.

Par. 4. Section 1.385–3 is amended by:

2. Revising the paragraph (b)(5) subject heading.
3. Revising the first sentence of paragraph (c)(3)(i)(C)(1).
4. Revising the paragraph (c)(3)(ii)(C)(3) subject heading.
6. Adding subject headings to paragraphs (g)(3)(iii) introductory text, (g)(3)(iii) introductory text, and (g)(3)(iv) introductory text.
8. Adding a subject heading to paragraph (g)(3)(v).
9. Revising paragraphs (g)(24)(ii)(B) and (C)

The additions and revisions read as follows:

§ 1.385–3 Transactions in which debt proceeds are distributed or that have a similar effect.

- (b) * * * *
- (3) * * * *
- (ii) * * * *
- (E) * * * *

(2) Effect of certain modifications. Notwithstanding paragraph (b)(3)(iii)(E)(1) of this section, if a covered debt instrument is treated as exchanged for a modified covered debt instrument pursuant to § 1.1001–3(b) and the modification, or one of the modifications, that results in the deemed exchange includes the substitution of an obligor on the covered debt instrument, the addition or deletion of a co-obligor on the covered debt instrument, or the material deferral of scheduled payments due under the covered debt instrument, then the modified covered debt instrument is treated as issued on the date of the deemed exchange for purposes of paragraph (b)(3)(iii)(A) of this section.

- (5) Coordination between general rule and funding rule.

Example. Application of paragraphs (c)(2)(iii) and (c)(4) of this section to an EGI.

- (ii) * * *
- (A) * * * Because FP is traded on an established financial market within the meaning of § 1.1092(d)—1(b) and US$I$ is a covered member, EI$A$, EI$G$, and EI$C$ are subject to the rules of this section.

- (C) The credit analysis was prepared with an analysis date of Date B of Year 1.
paragraph (b)(3) of this section to a covered debt instrument of the acquirer. For purposes of the preceding sentence, the term successor seller means a member of the expanded group that receives property (other than expanded group stock) in a distribution or acquisition from the seller or another successor seller and is controlled by the acquirer as determined under the principles of paragraph (c)(2)(i) of this section. A successor seller is treated as a successor to the acquirer to the extent of the value of the property received in a distribution or acquisition described in the preceding sentence and, for purposes of applying this paragraph (g)(24)(i)(B).

(C) To the extent that a covered debt instrument of the acquirer is treated as funding a distribution or acquisition by the seller or successor seller described in paragraphs (b)(3)(i)(A) through (C) of this section, or would be treated but for the exceptions described in paragraphs (c)(3)(i) and (ii) of this section, the value of the expanded group stock described in paragraph (g)(24)(ii)(A) of this section is reduced by an amount equal to the distribution or acquisition for purposes of any further application of paragraph (g)(24)(ii)(A) of this section with respect to the acquirer and seller.

Par. 5. Section 1.385–3T is amended by:

2. Revising the fifth sentence and adding a new sixth sentence to paragraph (h) Example 13(i).
3. Revising the third sentence of paragraph (h) Example 13(ii)(D).
4. Revising the third sentence of paragraph (h) Example 14(ii)(D).
5. Revising paragraph (h) Example 15(i).
6. Revising the fifth sentence of paragraph (b) Example 18(ii)(A).
7. Revising paragraph (l).

The revisions read as follows:

§ 1.385–3T Certain distributions of debt instruments and similar transactions (temporary).

1. Revising the first sentence of paragraph (b)(2).
2. Revising the first sentence of paragraph (b)(3)(i).
3. Revising paragraphs (b)(3)(ii) and (iii).
5. Revising paragraph (b)(5)(i).
6. Revising the first sentence of paragraph (b)(6).
7. Revising the first sentence of paragraph (c)(1)(i).
8. Revising the first sentence of paragraph (d)(3).
9. Revising the first sentence of paragraph (d)(4) introductory text.
10. Revising paragraphs (d)(4)(i) and (ii).
11. Revising paragraph (e)(3).

12. Revising paragraph (o)(5).
13. Revising the second sentence of paragraph (f)(3) Example 1(ii).
15. Revising the sixth sentence of paragraph (f)(3) Example 5(ii).
16. Revising paragraph (h).

The revisions read as follows:

§ 1.385–4T Treatment of consolidated groups.

1. Revising the sixth sentence of paragraph (b)(1) of this section does not apply in determining the members of an expanded group.
2. If a covered debt instrument treated as issued by a consolidated group under the one-corporation rule described in paragraph (b)(1) of this section is treated as stock under § 1.385–3 or 1.385–3T, the covered debt instrument is treated as stock in the member of the consolidated group that would be the issuer of such debt instrument without regard to this section.

(ii) Application of the covered debt instrument exclusions. For purposes of determining whether a debt instrument issued by a member of a consolidated group is a covered debt instrument, each test described in § 1.385–3(g)(3) is applied on a separate member basis without regard to the one-corporation rule described in paragraph (b)(1) of this section.

(iii) Qualified short-term debt instrument. The determination of whether a member of a consolidated group has issued a qualified short-term debt instrument for purposes of § 1.385–3(b)(3)(vii) is made on a separate member basis without regard to the one-corporation rule described in paragraph (b)(1) of this section.

1. A qualified contribution to any member of a consolidated group that remains a member of the consolidated group immediately after the qualified contribution from a person other than a member of the same consolidated group is treated as made to the one corporation described in paragraph (b)(1) of this section.

(i) First, determine the characterization of the transaction under federal tax law without regard to the one-corporation rule described in paragraph (b)(1) of this section.
(6) * * * For purposes of this section and §§ 1.385–3 and 1.385–3T, and notwithstanding the one-corporation rule described in paragraph (b)(1) of this section, a partnership that is wholly owned by members of a consolidated group is treated as a partnership. * * *

(c) * * *

(1) * * *

(i) * * * For purposes of this section and §§ 1.385–3 and 1.385–3T, when a debt instrument ceases to be a consolidated group debt instrument as a result of a transaction in which the member of the consolidated group that issued the instrument (the ‘issuer’) or the holder of the instrument (the ‘holder’) ceases to be a member of the same consolidated group but both the issuer and the holder continue to be members of the same expanded group, the issuer is treated as issuing a new debt instrument to the holder in exchange for property immediately after the debt instrument ceases to be a consolidated group debt instrument. * * *

(d) * * *

(3) * * * If a departing member has issued a covered debt instrument (determined without regard to the one-corporation rule described in paragraph (b)(1) of this section) that is not a consolidated group debt instrument and that is not treated as stock immediately before the departing member ceases to be a consolidated group member, then the departing member (and not the consolidated group) is treated as issuing the covered debt instrument on the date and in the manner the covered debt instrument was issued. * * *

(4) * * * This paragraph (d)(4) applies when a departing member ceases to be a consolidated group member in a transaction other than a distribution to which section 355 (or so much of section 356 as relates to section 355) applies, and the consolidated group has made a regarder distribution or acquisition. * * *

(i) If the departing member made the regarder distribution or acquisition (determined without regard to the one-corporation rule described in paragraph (b)(1) of this section), the departing member (and not the consolidated group) is treated as having made the regarder distribution or acquisition.

(ii) If the departing member did not make the regarder distribution or acquisition (determined without regard to the one-corporation rule described in paragraph (b)(1) of this section), then the consolidated group (and not the departing member) continues to be treated as having made the regarder distribution or acquisition.

(e) * * *

(3) Disregarded distribution or acquisition. The term disregarded distribution or acquisition means a distribution or acquisition described in § 1.385–3(b)(2) or (b)(3)(i) between members of a consolidated group that is disregarded under the one-corporation rule described in paragraph (b)(1) of this section.

* * *

(5) Regarded distribution or acquisition. The term regarded distribution or acquisition means a distribution or acquisition described in § 1.385–3(b)(2) or (b)(3)(i) that is not disregarded under the one-corporation rule described in paragraph (b)(1) of this section.

(f) * * *

(3) * * *

Example 1. * * *

(ii) * * * Pursuant to paragraph (b)(5)(i) of this section, the transaction is first analyzed without regard to the one-corporation rule described in paragraph (b)(1) of this section, and therefore UST is treated as issuing a covered debt instrument in exchange for expanded group stock. * * *

Example 4. * * *

(ii) * * * Under paragraph (c)(1)(i) of this section, for purposes of § 1.385–3, DS1 is treated as issuing a new debt instrument to UST in exchange for property immediately after DS1 Note ceases to be a consolidated group debt instrument. * * *

Example 5. * * *

(ii) * * * Under paragraph (c)(1)(i) of this section, for purposes of § 1.385–3, DS1 is treated as issuing a new debt instrument to USS1 in exchange for property immediately after DS1 Note ceases to be a consolidated group debt instrument. * * *

(h) Expiration date. This section expires on October 13, 2019.

Par. 7. Section 1.752–2T is amended by revising paragraph (m)(2) to read as follows:

§ 1.752–2T Partner’s share of recourse liabilities (temporary).

* * *

(m) * * *

(2) Paragraphs (c)(3) and (l)(4) of this section expire on October 13, 2019.

Martin V. Franks,
Chief, Publications and Regulations Branch,
Legal Processing Division, Associate Chief Counsel, Procedure and Administration.
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